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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1944

## No. 262

LORRAINE WILSON AND HULDAH DIEKMANN,
*Petitioners,*
*Appellants below,*

*vs.*

VAN VECHTEN SHAFFER, DON BARNES,
ARTHUR BARLOW, FRANK BYERS,
THE SHORES COMPANY, A CORPORATION, and
SHORES-MUELLER COMPANY, A CORPORATION,
*Respondents,*
*Appellees below.*

## PETITIONERS' REPLY BRIEF ON PETITION FOR WRIT OF CERTIORARI.

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## PETITIONERS' REPLY BRIEF ON PETITION FOR WRIT OF CERTIORARI.

### A.

It is true, as respondents say in their Statement of the Case, that the complaint in this case alleges all of the facts which would entitle the plaintiffs to recover in a derivative case on behalf of the old corporation, and that there is a prayer for general relief. Therefore, as we recognized in our brief in support of the petition, your petitioners might not be entitled to all of the relief which the allegations would justify, *i.e.*, derivative relief

on behalf of the corporation. That is what they tried to obtain in the prior case, and failed. But other plaintiffs are not under this same limitation.

However, there is the additional fact alleged in this case (R. 6) that plaintiffs have been excluded from a fair participation in the fruits of the sale of the corporate property and business to defendants, which lays a basis for a primary case also. (*Southern Pacific Co.* v. *Bogert*, 250 U.S. 483). That is the gist of the wrong inflicted directly upon the stockholders. The other wrongs alleged give rise only to an action in behalf of the corporation. The complaint in the prior case did not contain a comparable allegation of a wrong to stockholders, directly, and did not seek to assert any primary right.

The fact that the complaint in the prior case (R. 32) alleged that "plaintiffs bring this suit in the right of said corporation, as stockholders thereof, and also for themselves as individual stockholders entitled to the assets of said corporation if it be found that the charter of said corporation has been forfeited, or cancelled," did not make that case anything more than derivative. The plaintiffs, in either circumstance, complain only of a wrong to the corporation which they could enforce for it, or as successors in interest to it.

*Alexander* v. *Hillman*, 296 U.S. 222.

*Dana* v. *Morgan* (CCA 2nd) 232 Fed. 85.

The respondents admit the continued existence of the corporation, as a corporation sufficient to receive a recovery in this case, by filing its appearance and joining it as a moving party and the motion to dismiss in this case (R. 16). If the corporation was still in existence when this suit was filed, it was in existence when the prior suit was commenced.

Petitioners claimed no personal rights in the prior case except in the event that the corporation was unable to accept the benefit of any decree. That contingency did not occur.

The fair conclusion is that the prior case was derivative only, and this case is broad enough to be considered an assertion of both derivative and primary rights. Petitioners may not be entitled to act for the corporation and assert derivative rights, but they can assert their cause of action for the wrong directly inflicted upon them, which is the only relief specially prayed.

*Southern Pacific Co.* v. *Bogert,* 250 U.S. 483.

Other plaintiffs may be entitled to relief of either kind, derivative or primary.

In the last analysis, respondents' contention is that petitioners' rights of a primary nature (and which are sought to be asserted in this case) could have been decided in the prior case, and, therefore, are to be considered as barred by the judgment, even though they were not actually adjudicated. We concede that if those rights could have been decided in that case, they are within the bar of *res judicata.* But, we say that they could not have been decided in the prior case.

The rule upon which respondents rely applies only if the cause of action is the same in each case.

*United Shoe Machinery Corp.* v. *U. S.,* 258 U.S. 451.

In the prior case, the old corporation was the real plaintiff and the basis of the action was a breach of duty owed to it.

*Hutchinson Box Board Paper Co.* v. *Van Horn* (CCA 8th), 299 Fed. 424.

*Johnsen* v. *Ingersol* (CCA 7th), 63 Fed. 2nd 86.
*Smith* v. *Bradlee*, 37 N.Y.S. 2nd 512.
*Davenport* v. *Dows*, 85 U.S. 626, 21 L. Ed. 938.
Pomeroy, Equity Juris., 5th Ed., Sec. 1094-1095.

In this case (insofar as it is brought in the stockholders' primary right) the petitioners were the real parties in interest and the basis of the action is a breach of duty owed by respondents to petitioners, directly and independently of the duty to the corporation.

*Southern Pacific Co.* v. *Bogert*, 250 U.S. 483, 63 L. Ed. 1099.

The causes of action are not, therefore, the same. Compare *Missouri-Kansas Pipe Line Co.* v. *U. S.*, 312 U.S. 502, 508.

The parties were not, in law, the same.

Fletcher, Cyc. of Corporations, Penn. Ed., Sec. 5953.
*Hutchinson Box Board Paper Co.* v. *Van Horn* (CCA 8th) 299 Fed. 424.
*Troutmann* v. *Council Bluffs Street Fair and Carnival Co.*, 142 Iowa 140; 120 N.W. 730.

"There is a vast difference between the right of a shareholder to sue for the redress of an injury done to the corporation, and the right to sue to redress an injury done to the shareholder individually."

*Dana* v. *Morgan* (CCA 2nd) 232 Fed. 85, 89.

**B.**

An amended complaint has been filed by other plaintiffs (not petitioners herein) in the District Court, as respondents allege. However, *petitioners* have not done anything which could be considered a waiver of their right to complain of the judgment against them, or to petition

for certiorari. Other plaintiffs could not do that for them, as respondents contend.

If the dismissal of the case as to them should be reversed, nothing done in the District Court will have to be undone. Petitioners' rights are not different from those of other stockholders who are plaintiffs. The District Court would need only to know before ordering final distribution of the proceeds of the case, considered as brought in the stockholders' primary right, whether petitioners were entitled to share therein. That is a long way off, and if this matter should be then pending, the District Court can defer the final closing of the case.

## C.

This petition does not present an issue of fact. A motion to dismiss admits the facts well pleaded. The issue presented in this case is whether the judgment in the former case bars relief in this case. Both records are before the court, and the question whether both cases involved the stockholders' primary rights is a pure question of law. Moreover, it is a question of federal law, *i.e.*, the effect of a judgment of a United States court.

We respectfully submit that this is a matter which ought to be uniform in the several circuits, and that it would be appropriate for this Honorable Court to review this case in order to resolve the conflicts pointed out in our petition and supporting brief.

Respectfully submitted,

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IRVING B. CAMPBELL,
EDWARD J. DAHMS,
*Of Counsel.*